SUPREME COURT OF KENTUCKY
DOCKET NO. 2014-SC-000425-D
COURT OF APPEALS NO. 2012-CA-001780

MATT JONES, AND
LORI JONES, MOVANTS

VS. APPEAL FROM RUSSELL CIRCUIT COURT
CIVIL ACTION NO. 10-CI-00267

LARRY BENNETT, RUSSELL COUNTY SHERIFF,
NICK BERTRAM, RUSSELL COUNTY SHERIFF,
RUSSELL COUNTY, KENTUCKY, RESPONDENTS

BRIEF ON BEHALF OF RESPONDENTS

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a true and correct copy of the foregoing was this day mailed, postage prepaid, to: Hon. Robert L. Bertram, Bertram & Wilson, P.O. Box 25, Jamestown, KY 42629; Hon. Larry F. Sword, Sword & Broyles, P.O. Box 1222, Somerset, KY 42502; Hon. David A. Nunery, Hon. Steven C. Call, Nunery & Call, PLLC, 105 East Main Street, Campbellsville, KY 42718; Hon. Todd Page, Stoll, Keenon & Ogden, 2000 PNC Plaza, 500 West Jefferson, Louisville, KY 40202; Hon. Vernon Miniard, Jr., Judge, Russell Circuit Court, P.O. Box 727, Monticello, KY 42633; Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and the original plus nine copies via registered mail, returned receipt, to: Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, KY 40601-3488, and the undersigned counsel does further certify that the record on appeal has not been withdrawn by counsel, all this 3rd day of September, 2015.

WINTER R. HUFF, Counsel for Respondents

STATEMENT CONCERNING ORAL ARGUMENT

Respondents will participate in oral argument should the Court deem it helpful.

COUNTER STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATMENT OF THE CASE

This matter on review arises out of an automobile accident which occurred on or about May 3, 2009. Movant Matt Jones, was operating a vehicle on U.S. Hwy. 127 in the Jamestown, Russell County, Kentucky area. He was struck by a vehicle operated by Ricky Lawless, resulting in injuries. Movant Lori Jones, his wife, has asserted a claim for loss of consortium. (Complaint, paragraphs 1, 2, 12, 13, and 14).

Ricky Lawless was charged with operating the motor vehicle under the influence, fleeing or evading police, and wanton endangerment. He was later also charged with assault and possession of an open alcoholic beverage container in a motor vehicle.[1]

The specific allegations of the Complaint as they concern Deputy Bertram are set forth in paragraphs 7, 8, and 9 of the Complaint, and appear to assert that the Deputy "negligently chased" the vehicle driven by Ricky Lawless.

The 911 recording and transcript indicate that the initial call, complaining of a black Camaro being operated at high speed, was made at approximately 18:32 (6:32 p.m.) on May 3, 2009. R. Notice of Filing (Affidavit of Supervisor of 911 Dispatch Center and Transcript) served October 11th, 2011; see also Exhibit "A" of the Renewed Motion for Summary Judgment, Tab 2 of Appendix of Appellants' Brief filed in the Kentucky Court of Appeals on 3/3/13. The vehicle was reported to be in the Twin Creek Estates, and Deputy Bertram, who is officer 729, was dispatched.

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[1] The Trial Court was asked to take judicial notice of all records in the Russell Circuit Court, Case No. 09-CR-00063. As reflected therein, on or about September 29, 2010, Ricky Lawless entered a plea to several of the charges, and was sentenced to a term of incarceration. He was granted shock probation on April 14, 2011. Movants' counsel herein submitted a letter supporting his Motion for Shock Probation, on or about March 20, 2011.

Deputy Bertram reported that he turned onto the Wooldridge Schoolhouse Road, and the callers, identified as Tonya King and an unidentified man with her, were asked to wait in case he wished to speak with them. According to dispatch, the callers stated the vehicle went into Twin Creek Estates and had not come back out .

Deputy Bertram acknowledged said communication, and that he was turning onto Wooldridge Schoolhouse Road. After turning onto Wooldridge Schoolhouse Road, Deputy Bertram said "Dispatch, he's taking off on me. He's driving toward 127 [U.S. Hwy. 127]. . . he just ran into one head on, get an ambulance down here." Ricky Lawless was by then identified as the driver per dispatch.

The EMS call was received at 18:55 (6:55 p.m.). From the time of the initial call to Dispatch, with Deputy Bertram then leaving the Sheriff's office, and the Dispatch of the EMS to the accident scene, a total of 23 minutes elapsed.

Dispatch later reported to the Sheriff that "Nick [Deputy Bertram] was down there watching, waiting for it to come back out the road, and I guess the best I can figure, when the vehicle came back out, and seen Nick there, and took off. Nick hollered and said he's taking off on me. Get somebody down here, and it wasn't 10 seconds later that he said send me EMS, they've wrecked . . .".

Dispatch also reported that "the caller said that they were coming down the Bypass there at the new bridge, passed them going at least 100, and when he got up to the Twin Creek Estates, he was there doing donuts in the parking lot, or right there at the front of the road, and so when Nick got down there, he drove on down the road because the people stopped and waited to see if the vehicle would come back out, and it hadn't. Nick called and said it was down there at the residence, and

back out, and it hadn't. Nick called and said it was down there at the residence, and the people that called it told him it was Ricky Lawless that was driving. So he said he was going to sit here and wait on him to come back out." Dispatch affirmed that there was no long wait or chase, that "it was like all, you know, 15-20 seconds from the time he said they had took off from him to the time he requested EMS."

According to Deputy Bertram's sworn Answers to Interrogatories, the events unfolded as follows:

> A telephone call came into the dispatch that a driver of a Camaro was driving recklessly and was possibly drunk. Deputy Bertram went to the area where the Camaro was last seen and was patrolling the area. Deputy Bertram stopped in a church parking lot, and within minutes of pulling into the church parking lot, the black Camaro was observed travelling at a high rate of speed. The vehicle operator failed to stop at a stop sign before entering US Hwy. 127. (Answers to Interrogatories, Answer to Interrogatory No. 9, served on February 11, 2011).

While Movant Matt Jones testified that there had been prior report complaining of Ricky Lawless' operation of a motor vehicle earlier in the day (Deposition of Matt Jones, pp. 46-52), despite due request, the Movants failed to submit any records to support those allegations, much less that Deputy Bertram had any prior notice himself. (See deposition of Matt Jones, pp. 64-68).

Movant Matt Jones asserts that Deputy Bertram was told Ricky Lawless was the driver, and that Deputy Bertram should have known of Ricky Lawless' reputation for drinking, driving, and fleeing police. However, the Movant Matt Jones himself, a long time resident of Russell County, was not then aware of such alleged reputation. (Deposition of Matt Jones, pp. 69-75). Rather, Mr. Jones researched and

located this alleged history only after the accident at issue, and has never produced any proof of any such prior knowledge of on the part of Respondents.

Significantly, Ricky Lawless testified in his deposition that ***he never knew he was being followed by Deputy Bertram, much less being chased or pursued; he was not aware of anyone from the Sheriff's Office following him***. (Lawless deposition, p. 16; p. 19).

The Movants' contention that " . . . Deputy Bertram observed a drunk driver leave a residence and enter his vehicle and then pursued drunk driver Lawless. Deputy Bertram chased Lawless on US 127 until Lawless turned down a dead-end road. Then rather than block the roadway, Deputy Bertram waited for Lawless to come out of the dead-end road and began the chase again when Lawless came back onto US 127. . ." [Movants' Brief, p. 2] is not supported by any citation to any sworn testimony of record. Mr. Jones admitted under oath that his assumptions regarding the whereabouts of Mr. Lawless prior to the accident were based merely on speculation. (*Id.*, pp. 53-55). Further, as above, the evidence of record supports that Deputy Bertram only observed Lawless operating the vehicle for a very short time before the accident, and that Lawless himself was unaware of Deputy Bertram's presence at all.

ARGUMENT

I. Deputy Bertram is entitled to Qualified Immunity

A. This is not a pursuit case

The uncontroverted evidence is that it was reported to Deputy Bertram that someone, later identified as Mr. Lawless, was operating a black Camaro in a

dangerous fashion at a high rate of speed. Deputy Bertram promptly went to look, but *did not initially see* the vehicle in operation. Whether or not Deputy Bertram knew if and where Mr. Lawless had stopped at a private residence is ultimately of no import, because there would be no duty for Deputy Bertram to take any action against Lawless at such time when he was not operating a vehicle or otherwise appearing under the influence in public. Deputy Bertram reasonably waited to try to identify and intercede the operator of the vehicle if he resumed operation. When Deputy Bertram did observe the Camaro on a public road and attempted to stop it, he was unsuccessful because Ricky Lawless never even saw him.

Ricky Lawless has admitted, under oath, that he never even knew of any involvement by the Sheriff's Department in the events of May 3, 2009.[2] Thus, any reliance on pursuit cases is misplaced as nothing Lawless did was in response to any pursuit by Deputy Bertram.

Accordingly, this case must be distinguished from *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), and similar cases, in which the motor vehicle accident is causally related to the negligent operation of the vehicle by the police officer. In this case, the method and manner of operation of the police cruiser by Deputy Bertram had nothing whatsoever to do with the accident involving Mr. Jones and Mr. Lawless.

This case is likewise readily distinguished from *Mattingly v. Mitchell*, 425 S.W.3d 85 (Ky. App. 2014). There, the Court of Appeals held that a police officer did

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[2] Any theory of causation related to these Respondents fails as a matter of law. Negligence, in order to be actionable, must be the proximate or legal cause of harm to another. *Restatement Second, Torts, Section 431*; see also III, B. *infra*.

not have qualified immunity for the death of a person injured in a collision with another vehicle fleeing pursuit by the officer, who had observed a vehicle speeding on the Watterson Expressway. The officer activated lights on the police vehicle, and attempted to stop the speeder at an exit, but the vehicle re-entered the Expressway at a high rate of speed and the officer pursued. The officer determined to end the pursuit, but shortly thereafter, several blocks away, the speeding vehicle collided with another vehicle, causing the death to one and serious injuries to another.

Significant to the Court of Appeals decision in *Mattingly*, however, the police officer who engaged in the high speed pursuit was found guilty of misconduct for violation of the police department's standard operating procedures for pursuing a vehicle "at a high rate of speed on wet road conditions for traffic violation with minimal ability to apprehend Nelson and without considering the risk created against the need for apprehension." *Id.*, p. 87. The Court of Appeals considered the immunity doctrines as articulated in *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) and *Haney v. Monsky*, 311 S.W.3d 235, (Ky. 2010), and further considered, but distinguished, the decision of *Jones v. Lathram, supra.* Ultimately, the Court of Appeals held that the characterization (ministerial v. discretionary) of the officer's actions in *Mattingly* had to be viewed in the context of the police department's standard operating procedures. The Court explained: "whatever discretion Mattingly may have had in initiating and continuing a pursuit, it was limited by the Louisville Metro Police Department's standard operating procedures ... those procedures provide specific directives to its officers when initiating or engaging in a pursuit. The repeated use of the term 'shall' establishes that compliance with its

provision involves 'merely execution [or non-performance] of a specific act arising from fixed and designated facts.'" *Mattingly, supra*, at p. 90, citing *Yanero, supra*, at p. 522.

Here, those facts simply do not exist. This is not a pursuit case at all.[3] There are no allegations that Deputy Bertram violated any policies and procedures of the Russell County Sheriff's Department, much less that any violation caused the accident given Lawless' ignorance of police presence.

B. Deputy Bertram did not violate any duty

Movants propose that Deputy Bertram was obliged to take some action against Ricky Lawless at a time when he was allegedly at a private residence and not operating a motor vehicle. The Movants posit after the fact that Deputy Bertram could have set up a road block or some other means of assuring that the motor vehicle accident with the Movant Jones would not have occurred, but offers no facts as to how such a strategy could have been formulated and implemented under the time constraints at issue, ***and cites no law that Deputy Bertram had any ministerial duty to take any such action***.

Even if Deputy Bertram should have, with 20/20 hindsight, handled the situation differently, such second guessing does not mean that the Deputy's choice of proceeding was wrongful. There is simply no fact, no law, no policy, and no

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[3] Some of the pursuit decisions of the Kentucky courts may, in some respects, be out of step with precedent from the United States Supreme Court. As the United States Supreme Court held in *Scott v. Harris*, 550 U.S. 372, 385-386 (2007), there is no "... rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger ..." [the Constitution] "... does not impose this invitation to impunity-earned-by-recklessness." See also *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2021-2024, and footnote 3 therein (2014).

procedure which imposed on Deputy Bertram a ***ministerial*** duty to respond in some way other than what he did.

Accordingly, Deputy Bertram is entitled to qualified immunity, as his conduct in determining when and how to approach Mr. Lawless was clearly a discretionary function, one which "necessarily requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney, supra*, at 240.

Whether to arrest a suspect is a discretionary act. *Jeffers v. Heavrin*, 10 F.3d 380 (6th Cir. 1993). *Jeffers* involved an arrest of an attendee at the 1983 Kentucky Derby, who possessed an unlabeled bottle with unidentified pills. The Sixth Circuit Court of Appeals upheld the decision of the District Court that the officer had qualified immunity against claims for unlawful arrest, even though the Court also found that the arrest was not supported by probable cause.

C. There was no clearly established legal duty

Even if this Court were to hold that Deputy Bertram did have some duty to act differently than he did, certainly Deputy Bertram had no notice of such duty. Shortly before the event in issue, the Kentucky Court of Appeals decided *Wasson v. Morris*, 2008-CA-000780-MR (Ky. App. 2009), holding that the determination of whether to arrest is inherently discretionary, citing *Jeffers, supra*. *Wasson* was decided on March 6, 2009, and ordered not to be published on August 19, 2009. The events in issue occurred on May 3, 2009. See Appendix hereto, Exhibit "A" for a copy of this decision.

This Court has otherwise reiterated by a published decision the circumstances under which a public official is entitled to qualified immunity:

> When an officer or employee of the state or county . . . is sued in his or her individual capacity, that officer employee enjoys qualified official immunity, which affords protection from damages liability ***for good faith judgment calls made in a legally uncertain environmen***t . . . the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. Discretionary acts are, generally speaking, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment. It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. On the other hand, ministerial acts or functions – for which there are no immunity – are those that require only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.

Haney v. Monsky, supra at p. 240 (emphasis added). This reasoning is applicable here.

See also *Haugh v. City of Louisville*, 242 S.W.2d 638 (Ky. App. 2007), in which officers were held entitled to qualified immunity against a wrongful death claim when the officers' use of pepper spray, bean-bag rounds, spray from a fire hose, and physical combat, to effectuate an arrest resulted in fatal injuries; that the officers had discretion in whether and how to effectuate an arrest (provided force not unreasonable). The *Haugh* decision cites to the seminal decision of *Yanero v. Davis, supra*:

> To show that a peace officer acted in bad faith when making an on-the-spot judgment call, the complainant must demonstrate that the officer *knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the complainant's rights or that the officer took the action *with the malicious intention* to cause a deprivation of constitutional rights or injury ...

Haugh, p. 686, citing *Yanero*, p. 523 [emphasis in original]. There is no such evidence in this case.

The Movants have failed to put forth any evidence of any statute, policy, or procedure which **required** Deputy Bertram to respond to unfolding events in a particular way. The Movants do not cite to any Kentucky case with similar facts, or, for that matter, any case which would have put Deputy Bertram on notice of any such duty. It certainly cannot be held that any such right was "clearly established" so as to deprive Respondents from immunity. *Id.*; see also *Jefferson County Fiscal Court v. Peerce,* 132 S.W.3d 824, 837 (Ky. 2004).

In sum, the proposition that Deputy Bertram not just could have, and not just should have, but ***had a ministerial duty*** to effectuate (a) a warrantless arrest (b) at a private residence (c) of a person whom the Deputy had not directly observed engaged in any unlawful conduct, is unsupported by any fact or legal precedent.

II. The other Respondents are likewise entitled to immunity

Sheriff Bennett, who appears to have only been named in an official capacity, and Russell County are each/both entitled to sovereign immunity. Claims against an official in his/her official capacity are the same as claims against the entity itself. *Yanero, supra* at p. 518. Accordingly, the official capacity claim against Sheriff Bennett is effectively the same as the claim against Russell County.

Unlike qualified immunity, the determination of sovereign or governmental immunity is not concerned with whether duties are ministerial or discretionary. Rather, the only question is whether the entity and its officials are carrying out a function integral to their governmental purpose, or whether they are engaged in a private or for profit enterprise. E.g., *Schwindel v. Meade Co.*, 113 S.W.3d 159, 168 (Ky. 2003) (citations omitted). These Respondents were clearly engaged in governmental functions and are thus entitled to immunity. *Id.*

While the nature of the Movants' claims against Sheriff Bennett and the County were not clearly pleaded, nevertheless, there are no facts or law to abrogate their entitlement to immunity. While KRS 70.040 has been held to constitute a waiver of sovereign immunity for the torts of a deputy, because Deputy Bertram did not commit any tortuous act or omission, KRS 70.040 is simply not applicable; this statutory waiver of immunity is premised upon a tortuous act of the deputy. Here, there is no tortuous act. *Cp./cf. Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008).

III. Summary Judgment Was Properly Granted

A. The Respondents were entitled to immunity as a matter of law

There was no genuine issue of material fact for trial because the immunity determinations are questions of law. *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006). The Movants had a full and fair opportunity to conduct all relevant discovery, albeit the immunity bar is a right to be free of the burden of defense. E.g., *Breathitt County Board of Education v. Prater*, 29 S.W.3d 883, 886-7 (Ky. 2009). The Movants did not present any affirmative evidence showing that Deputy Bertram was doing anything other than exercising his discretion in good faith. The Movants have not

and cannot show in this case that any of the conduct of any of these Respondents was outside of the course and scope of their employment or undertaken in bad faith. Absent those allegations, immunity is a bar to the Movants' claims as a matter of law.

B. There is regardless no evidence of causation

As noted above, the tortfeasor himself, Ricky Lawless, was completely unaware of any involvement by Deputy Bertram. Accordingly, the Movants' claims against Respondents would in any event fail for lack of evidence of a causal connection between any acts or omissions of Respondents and the injuries suffered by Movants. Even if Deputy Bertram could be found negligent, any negligence is not actionable. E.g., *Restatement Second, Torts, Section 431.*

It would have been proper to uphold the Summary Judgment of the trial court on this basis alone, as there were no material issues of fact and the conduct of the Respondents, as a matter of law, was simply not the proximate cause of the Movants' injuries. *House v. Kellerman*, 519 S.W.2d 380 (Ky. 1974); *Bruck v. Thompson*, 131 S.W.3d 764 (Ky. 2004).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decisions of the Russell Circuit Court and the Kentucky Court of Appeals should be affirmed.

WINTER R. HUFF, Counsel for Respondents